BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals is published in 112 Fed. (2d) 488.

The rule of Court involved is Rule No. 50 of Rules of Civil Procedure for the District Courts of the United States. This rule became effective September 1, 1938. The trial of the case was held in the District Court for the District of Rhode Island, January 31, 1939, to February 6, 1939 (R. pp. 582, 583).

The pleadings were concluded by the filing of a bill of particulars on May 23, 1938. The pleadings were all drawn and filed according to the form and practice in Rhode Island.

There are two defendants, viz., The Ferro Concrete Construction Company and The Seaboard Surety Company.

Each has filed similar pleadings. We cite the Ferro Company pleas.

By the second plea each defendant pleads in substance as follows:

1. The Ferro Concrete Construction Company, "principal upon bond," did perform the said conditions of the said bond, did observe and perform the contract, performance of which by Ferro Concrete Construction Company was condition of said bond, and did, in accordance therewith, *make payments in full to Luchini & Son for all labor and materials supplied to them in the prosecution* of the work provided for in the said contract of January 28, 1933 (R. p. 15).

Intervenors' replication to second plea *denied* that Ferro Concrete Construction Company as principal upon bond did perform the conditions of the bond, did observe and perform its obligations under the contract, the performance of which by defendant Ferro Concrete Construction Company was the condition of said bond, or *did pay in full to* Luchini

& Son for all labor and *material supplied by them in the prosecution of the work provided* for in said contract of January 28, 1933 (R. p. 17).

2. Defendants, by a third plea, actually set up the agreement dated March 25, 1933, and claimed the payment of $30,000 under it was payment in full for all labor and materials furnished (R. pp. 15 and 16).

Intervenors filed two replications to this third plea. Both replications alleged similar facts, but the first replication was based upon an *implied* promise to pay the quantum meruit value of the work, labor and materials furnished, while the second replication set out an *express* promise to pay such quantum meruit value (R. pp. 17, 18 and 19).

Intervenors' replication to third plea, setting up the implied agreement, confessed the making of the instrument dated March 25, 1933, and avoided, alleging that differences arose in consequence of which—

> "Said defendant did then and there by itself, its agents and servants, *take over and use the plant,* quarries, trucks, equipment and employees of the petitioners, in the performance of its aforesaid contract, that petitioners, at the request of the defendant, and outside the requirements of their said writing, did make additions to their plant and equipment for use of and used by said defendant *in and about the performance of and to complete in its own way* and according to its own desires, its contract dated January 28, 1933, in said plea mentioned. *Whereby there became due your petitioners, the fair value of the material and for the use of said trucks, equipments and labor supplied* the said defendant as alleged in their petition, and that though often requested," etc. (R. pp. 17, 18).

Intervenors' further replication to third plea also confessed and avoided, alleging similar facts but alleging the *express* agreement that—

> "Said defendant *agreed* with your petitioners in substitution for and in modification of said writing dated March 25, A. D. 1933, that the petitioners would allow said defendant the use of their plant, materials from their quarries, trucks, men and equipment for that purpose, and that the said defendant would pay your petitioners on the basis of the fair worth of all materials taken and for the use of the plant, quarries, trucks, men (including all payrolls)" (R. pp. 18, 19).

Petitioners presented evidence to prove the express agreement alleged in this further replication. This agreement was made through Starr. The Circuit Court of Appeals found insufficient evidence of Starr's authority to bind Ferro Concrete Construction Company and directed judgment for respondents contrary to the verdict of the jury, as above stated.

But no consideration was given by the Court to the issue raised by the first replication above noted.

I.

The Circuit Court of Appeals erred in depriving the petitioners, L. Luchini & Sons *et als.*, of their right of trial by jury guaranteed under the amendment to the Constitution of the United States by directing judgment for the defendant, notwithstanding the verdict of the jury for the petitioners, as follows:

First: The Court erred in holding that there was no evidence before the jury of Starr's express authority to make the agreement in suit.

The evidence relating to Starr's authority is that—

1. He was superintendent of the construction on this job (Loring, p. 433, Q. 29).

2. Starr had been a superintendent of construction for twenty years and had had charge as such superintendent of many large jobs (Starr, p. 352, Qs. 17 to 20).

3. Loring sent Starr to this job as superintendent (Loring, p. 433, Q. 29).

4. Concerning his duties, Starr said they were "to see that the building was erected within the time allowed by our contract with the government" (Starr, p. 357, Q. 56).

5. Loring said: "We are a small company so our duties are rather multifarious" (Loring, p. 430, Q. 8). The Ferro Company did not offer in evidence any by-law or resolution of the Board of Directors which definitely defined the duties or authority of Starr, or, for that matter, even the duties or authority of Loring himself. The very fact that a superintendent of construction, who had held that position with the defendant *for twenty years,* would *make the agreement* (as the jury found he did) was material evidence in itself that Starr had the authority to do it. Any prudent man might assume that a superintendent of twenty years' experience would know his authority and would not be likely either willfully or ignorantly to exceed it. This evidence alone was material evidence for consideration of the jury.

6. Another bit of evidence for the jury on the scope of Starr's authority is contained in the general contract with the government.

Ferro's place of business was in Cincinnati, Ohio. In this general contract, Ferro Concrete Construction Company was required (p. 4, art. 8 thereof) to—

> "Either give his personal superintendence to the work or have a competent foreman or superintendent on the work at all times during progress *with authority to act for him*" (R. p. 41; Plaintiffs' Exhibit 1). This

Exhibit was before the jury (R. p. 495); and was before the Circuit Court of Appeals for inspection (R. p. 577, Stipulation).

This authority had to be co-extensive with that of the contractor.

Ferro Concrete Construction Company chose not to give its personal superintendence to the work, but named Starr as its representative under that provision.

In this general contract with the government it is provided (p. 3, arts. 3 and 4) that the government agent may make changes in the plans and other details, to which *changes* the superintendent on the job is required to have authority either to agree and adjust, or not to agree and refer, as provided under article 15 of that agreement.

The jury could find that Starr was given this general authority and that he acted under it; and that, if he acted on it with the government, he could and did act under it with subcontractors on the same work, including Luchini. In fact, Starr testified for the defendant that he did have a rather wide experience in changing contracts.

7. The respondents put in the testimony of Starr that he did alter or change the contracts by authority of the respondents. Respondents were attempting to show a custom by Ferro Company that whenever any change in a contract was made it had such changes confirmed in writing. Respondents' counsel first asked Starr:

"Q. 220. Did you at any time . . . have authority to make a contract in behalf of the Ferro Co.?

"A. No."

Then followed:

"Q. 221. As superintendent on the job—on various jobs, Mr. Starr, have you had *experience with altera-*

tions of details with respect to contracts and so on? Just answer yes or no.

"A. Yes.

"Q. 222. What, during your employment with Ferro Concrete Construction Company, has been the uniform practice, if any, with respect to whether changes of any sort in a contract are confirmed in writing?" (R. p. 380, Qs. 220 to 222).

Although Starr denied having authority to make contracts for defendant, he asserted, in answer to respondents' question, that he had *experience in altering contracts,* and this experience had apparently continued during Starr's entire course of employment; for counsel assumed him qualified from this *experience* to tell what the practice of the Ferro Company had been, *during his employment,* with reference to putting such *changes in the contract* in writing. This was defendant's proof, not plaintiff's. We cannot see how, in the face of this testimony, defendant can successfully deny that Starr had authority to make changes and alterations in contracts.

If a distinction is attempted between authority to make a contract and authority to alter or change a contract, it is rather subtle, because every changed term in a contract based upon a consideration creates a new contract composed of the new term and the unchanged terms of the old contract.

8. We contend that this testimony did not present a question of law for the Court, but did present a question of fact for the jury, on the question of Starr's authority; we contend that a jury could find from this testimony and the other testimony, including the fact that Starr did make the agreement upon which this suit is based, that Starr had been making such alterations and changes in contracts during his entire employment and had full authority to do so. If Starr had been permitted to answer this last question, his answer could only have been "No," or "Not necessarily"; because

we shall see, *infra*, that on August 8th Starr *wrote* the instrument signed by himself and Luchini and only put in writing that half of the agreement relating to permitting Ferro Company to put in a man to see that the money Ferro advanced was applied to their work, and did not put in writing the part of the agreement relating to the advance of the money, by Ferro Company, for payrolls; yet that was as much a part of the agreement made August 8th as was the part referring to the putting in the man to look out for the application of the money.

But the main point is that the testimony of Starr put on by the respondent was evidence that Starr had authority to make alterations and changes in contracts. The jury could find from this evidence that he had express authority to that end.

Second: The question whether Starr was acting within the scope of his authority in making the contract was a question of fact and not of law.

1. There was evidence that Starr had authority to change the contract, brought to Luchini's attention, when Luchini asked for money to be advanced to Luchini & Son before it was due under the contract. Starr had several times procured an advance of money from Ferro Company to Luchini when the instrument dated March 25, 1933, did not require it. Luchini had asked Starr for money and had received it before any stone had been shipped to the site of the building at Newport (Luchini, p. 63, Qs. 155 to 160).

Correspondence in evidence shows that Luchini procured this through Starr. A letter dated July 14th from Ferro to Luchini read:

> "As per *request received from Mr. Starr* today we are sending you herewith check for $800," etc. (Luchini, p. 151, XQ. 805; also Ferro Exhibit M for Identification, p. 151, Q. 802).

Again, letter dated July 20th, Ferro to Luchini:

> "We sent you by air mail today certified check for one thousand dollars as *per Mr. Starr's request,*" etc. (Luchini, p. 152, XQ. 812).

No request for this money was made to Ferro Company. It was procured through Mr. Starr. Luchini recognized that this money was advanced without any obligation under the contract (Luchini, p. 152, XQ. 807).

2. No one of these advances was called for by the contract dated March 25, 1933. That instrument provided for payments of money as follows:

> "that is to say, it [Ferro Company] will pay to the party of the second part [Luchini & Son] a sum of money equal to 90% per centum for all labor and material which has been placed in position and for which payment has been made by said owners [the Government] to said party of the first part [Ferro Company] including granite stone at the site," etc. (R. p. 530, for this contract).

These payments were a change or modification of the contract with reference to the money payment provisions.

3. When Luchini did later communicate directly with Mr. Loring, of the company, to get an advance of money, *he was referred to Starr.* On August 1st Ferro Company (Mr. Loring) telegraphed Luchini:

> "Starr reports one hundred surface feet completed Monday. As you know this is less than one-fifth of minimum requirements. Won't you *please write me fully and completely what the trouble is and what can be done immediately to get necessary production?*" (Luchini, p. 153, XQ. 819; Ferro Exhibit O, p. 153, XQ. 817).

On August 4th Luchini telegraphed to Loring direct, in answer to the above telegram. This telegram explained payroll and ended with the following:

> "Vitally necessary one thousand advance on fixed expenditures for pay roll tomorrow . . . must pay off tomorrow stop return wire necessary and funds must be telegraphed to be of use in this emergency" (Luchini, p. 65, Q. 170; Petitioners' Exhibit 12).

Luchini got no response to that telegram (R. p. 65, Q. 171). On August 5th, Luchini again wired Loring:

> "Have funds been wired us?" (Luchini, p. 157, XQs. 853 to 855; Ferro Exhibit P for Identification).

Loring did not answer this telegram either (Luchini, p. 157, XQ. 856).

4. Loring said that he did not wire Luchini an answer to these telegrams *but that he sent Mr. Starr to him* (Loring, p. 466, XQ. 244). Loring "told Mr. Starr to do all that was reasonably necessary to get this granite out" (Loring, p. 466, XQ. 251). [Loring modified this later and said that Starr did not have any authority to modify the contract (XQ. 252). Loring added this because he "had previously testified that Mr. Starr had no authority there. When [he] said that [he] knew that he must change it [*i.e.*, this last statement]" (Loring, p. 467, XQs. 253 and 254). Loring also denied that the agreement of August 8th to advance the payroll week by week and to put a man in the quarry was a change in the contract; then he said: "I will take that back. It was a change, sure" (Loring, p. 468, XQs. 261 to 263).]

5. Whatever secret instructions Loring may have given Starr, he did not notify Luchini, in answer to his telegrams for money, that he was *sending Starr* to him with any limita-

tion of authority. Loring did not notify Luchini at all. He just sent Starr.

6. Starr came to the quarry to see Luchini, on August 8, 1933, apparently of his own accord. This is according to his own testimony. Starr said he came from Boston that morning (R. p. 394, XQ. 330). Starr said Luchini told him he needed more money. He said he did not see how he could go on unless he got more money (R. p. 364, Qs. 110 and 111). Starr said: "The only thing I can think of, if he must have more money to meet his payrolls, was to put a man in the Quarry so that we could be sure that any money we might advance to him on the contract was spent on our work" (Starr, p. 364, Q. 114). Luchini agreed (Q. 116). Starr wrote out the agreement (Plaintiffs' Exhibit 13) and Luchini signed one copy and gave it to Starr (Starr, p. 365, Q. 120). Starr signed a copy as agent for Ferro Company and gave it to Luchini (Starr, p. 393, XQs. 324 to 329; Plaintiffs' Exhibit 13, introduced).

The agreement which Starr wrote, Plaintiffs' Exhibit 13, made August 8, 1933, is short, and we quote it as follows:

> "Gentlemen: We, L. Luchini & Son, Co-partners, do hereby grant permission to Ferro Concrete Construction Company to place a man in the L. Luchini & Son quarry and cutting yard to expedite the work of getting the necessary stone work for Naval War College Building, Newport, Rhode Island. It is mutually recognized that such action on the part of the Ferro Concrete Construction Company is to be taken or construed solely as an effort to assist both parties in the erection of the Naval War College Work, and is not intended in any way to interfere with L. Luchini & Son's general supervision and direction of the work." Signed, L. Luchini & Son, by James Luchini. Ferro Concrete Construction Co. by Starr.

7. Note that, while the written part of this agreement referred to Luchini's agreement to admit Ferro's man to the quarry, it did not recite Ferro's duty to provide the payroll weekly, as stated by Mr. Starr to be part of the agreement.

Here was an agreement, that Loring admitted was a change in the instrument dated March 25, 1933, *made by Mr. Starr.* An examination of the oral and written parts of this agreement, made August 8, 1933, shows that it was a change in the instrument dated March 25th in two respects:

(*a*) There was nothing in the latter agreement to put an "expediter" into the quarry.

(*b*) The agreement of August 8th to advance money for the payroll, before the fabricated stone was delivered at the site at Newport, placed in position and paid for by the government, was all at variance with the money payment provisions of the instrument dated March 25, 1933.

8. From Loring's standpoint, he sent a man named Lorimer to the quarry under this modification of the agreement, by Starr, made August 8th, "as a result of a conference with Mr. Starr" (Loring, p. 467, XQ. 258).

From Luchini's standpoint, Lorimer appeared at the quarry, without any notice of any kind from Loring, within a week and apparently in response to the agreement of August 8th made between Luchini and Starr (Luchini, p. 67, Qs. 183 to 185; Sesona, p. 227).

This would certainly look to any reasonable man as though Starr was the proper man to deal with in relation to the money payment provisions provided for in the contract dated March 25, 1933.

After Loring telegraphed Luchini on August 1st, asking what the trouble was and what could be done to remedy it,

and Luchini telegraphed Loring on August 4th and August 5th for money for payroll; and Loring sent Starr to Luchini to make some arrangement, *without himself answering Luchini's telegrams, or telling him he was sending Starr with any limited authority;* and Starr came August 8th and made the agreement varying the instrument dated March 25th as with full authority; and Lorimer came promptly to the quarry to act under that agreement, again without any notice to Luchini from Loring that Lorimer was coming; it was certainly a *question for the jury whether a reasonable man,* under the circumstances, would consider that Starr had authority to continue discussion of the same question which Luchini considered he and Starr had decided August 8th, after Lorimer had broken that agreement.

9. The Court erred in circumscribing Starr's authority as a matter of law. The Honorable Circuit Court of Appeals states in its opinion as follows:

> "The record is somewhat lacking in evidence as to the *status* of Starr" (112 Fed. (2d) at p. 491).

The opinion then goes on to relate certain evidence which influenced the Court's decision. The opinion further states:

> "The evidence does not show that the apparent scope of authority given Starr as Superintendent of Construction was any greater than that title would imply . . ."

Again:

> "The information obtained by Luchini in his dealings with the Company was amply sufficient to put him on notice *that Starr had no general authority to act for the company outside of the particular sphere of activity indicated by his title," etc.* (112 Fed. (2d) at p. 492, par. 8).

The Court has circumscribed Starr's authority as a matter of law, by the words of his title, Superintendent of Construction. There is no evidence in the case as to what authority the title "Superintendent of Construction" actually confers on an agent. There is nothing in the case to authorize the Appellate Court to take judicial notice of the meaning of those words.

Starr's authority is fairly presented as a question of fact for the jury under all the evidence and not as a question of law on part of the evidence.

Starr's title is not evidence to circumscribe his authority. A general's first subordinate officer may be a lieutenant. In the absence of the general the lieutenant has full command; when the general is present the lieutenant has very limited authority. His title, lieutenant, does not determine his authority.

Third: The Court erred in not properly applying the decisions of this Supreme Court to the evidence in the case.

We will assume for the sake of argument that Starr did not have authority to make the agreement here in suit. This, however, did not authorize the direction of a judgment contrary to the verdict.

The Circuit Court of Appeals, in its opinion, finds the fact—

> "that Starr was sent to Newport to manage the construction, his job being to see that the work was done according to the contract with the government and the stone furnished according to the sub-contract with Luchini" (112 Fed. (2d) at p. 491, par. 7).

There is no conflict between the parties, nor upon the part of the Court, but that it was Starr's duty to receive the stone from the quarry and to approve or reject

the stone if not satisfactory in any particular. Dissatisfaction might arise as to correctness of fabrication, color as not conforming to sample, or offered at a price contrary to that called for in the agreement. It would be Starr's duty not to accept it unless right, for acceptance might cure the error.

It is a rule of law that notice to an agent is notice to his principal, not only as to knowledge acquired by the agent in the principal transaction, but also as to knowledge acquired by him in a prior transaction and *present in his mind at the time when he is acting as such agent.* That rule of law is applied by this Honorable Supreme Court; and under the facts it was an error in the Circuit Court of Appeals not to have applied it in the case at bar.

(*a*) Starr made the agreement, upon which this action is based, with James Luchini, acting for Luchini & Son, about two weeks after August 8, 1933.

(*b*) After the making of that agreement Starr continued every day to act in his capacity as superintendent of construction to receive this stone from the Luchini quarry. After having made the agreement, the fact that Luchini & Son were permitting and assisting Lorimer and Starr to take this stone out of the quarry *under the agreement that it was to be paid for on a quantum meruit basis,* rather than at the old contract price in the instrument dated March 25, 1933, was present in Starr's mind *at the time when he was acting as agent to receive the stone.* Starr could not help that knowledge being present in his mind when it had been made so recently.

Continuing the assumption that Starr made the agreement, without authority, it would have been in the nature of a "prior transaction" by which his *principal* was not bound, but of which *Starr* had knowledge.

But when Starr started in immediately afterwards to receive the stone *in the acknowledged course of his employ-*

ment as superintendent of construction for his principal, the Ferro Company, his principal was charged with Starr's knowledge of the making of that agreement; when Starr took the benefit of that agreement for the Ferro Company, it was bound by the agreement.

We cite leading cases of the United States Supreme Court, and of Rhode Island, the state of the forum, applying the rule:

> *The Distilled Spirits*, 11 Wall. 356, 366.
> *Cook* v. *American Tubing & Webbing Co.*, 28 R.I. 41.

The Court has stated the rule as follows:

> ". . . So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; *if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend* on the lapse of time and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect, but he is not bound by knowledge communicated to his agent, *unless it is present to the agent's mind at the time of effecting the purchase.* Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is

based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty."

The Distilled Spirits, 11 Wall. 356, 366.

Each shipment of stone, under the above rule, would constitute a *purchase* for the principal within the rule.

In Thompson on Corporations the rule of the above case is stated as follows:

"'Sec. 5200. Knowledge Acquired in a Previous Transaction, but Present in the Mind of the Agent when Acting in the Particular Transaction.—In like manner, The Supreme Court of the United States has held that the rule that notice to the agent is notice to the principal, applies *not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction*, and *present in his mind at the time when he is acting as such agent*, provided it be of such a character as he may communicate to his principal without a breach of professional confidence.

4 Thompson, Corporations, sec. 5200; citing *The Distilled Spirits*, 11 Wall. 356, 366.

Rhode Island, where the trial was held, adheres to the same rule.

Cook v. *American Tubing & Webbing Co.*, 28 R.I. 41, 44, 45, 69-70, 72-74.

National Bank of N.A. v. *Thomas*, 30 R.I. 294, 299.

We quote from the *Cook* case, *supra:*

> "The rule as stated by the Supreme Court of Missouri, is that, where the fact of the agency is established, knowledge acquired by the agent, *not only during the continuance of his agency, but also that possessed by him so shortly prior to his appointment as necessarily to give rise to the inference that it remained fixed in his memory when the employment began,* must be *deemed* the *knowledge* of *his principal.*
>
> "The cases upon this rule mostly relate to notices of particular facts given to agents or corporate officers for the purpose of charging the principal; but the question here is as to facts in the knowledge of the officer respecting transactions in which he was *the prominent actor and which he could not have ceased to have in mind while he was acting for the corporation.*"
>
> Held: The Trust Company was charged with the knowledge of Dresser and could not recover.

Starr having made the agreement, even though without authority, when he immediately assumed his role as superintendent of construction to receive the stone from Luchini & Son, the defendant, his principal, was charged with his knowledge that he was receiving the stone under the terms of the new agreement and that Luchini & Son had proceeded along with him in this, assuming that they were to be paid according to the new agreement.

Fourth: There was substantial evidence of Starr's authority and of his action being within the apparent scope of his authority submitted to the jury to sustain its verdict on that issue. The plaintiffs had a verdict from the jury

in their favor. The judgment should be for the plaintiffs in support of the verdict.

Aetna Insurance Co. v. *Kennedy,* 301 U.S. 389, at pp. 394, 396.

II.

Assuming that there is an insufficiency of evidence of Starr's authority to make the contract in suit, yet the issue of the *implied* agreement, presented by the first replication of petitioners to the third plea of respondents, is supported by substantial evidence to sustain the jury's verdict. The Circuit Court of Appeals erred in not entering judgment on the verdict for petitioners.

The replication is referred to in the statement to the brief (p. 13) (see R. pp. 17, 18).

1. The jury found that Starr and Luchini actually made the agreement in suit. The Court especially submitted the question to the jury (see Charge, R. pp. 483, 484; 489, 490).

2. In Rhode Island the verdict of the jury concludes all issues, upon which material evidence has been presented, in favor of the party in whose favor it is found.

We quote:

> "The Court will presume after verdict rendered that everything *was found by the jury which was necessary to support the verdict, even though not alleged* in the pleadings of the party in whose favor the verdict has been found."
>
> *Irons* v. *Field,* 9 R.I. 216.

We also cite:

> *Municipal Court &c.* v. *Corcoran,* 12 R.I. 63, and *Burdick* v. *Kenyon,* 20 R.I. 499, 400.

There can be no question of the effect of the verdict when the issue is *alleged* in the pleadings.

The law of the state of the forum governs the verdict.

> "The sufficiency of pleadings and *the form and effect* of verdicts in actions at law are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the state in which they are held."
>
> *Glenn* v. *Summer*, 132 U.S. 152.

3. There was material evidence to support the making of the agreement in suit.

(*a*) The incident that brought about the making of the agreement was Luchini's claim that Lorimer had taken the management and operation of the quarry out of Luchini's hands.

Luchini testified:

> "Q. 194. Now, when he came onto your property,—when he came there, what did Mr. Lorimer do?
>
> "A. As soon as he got acquainted with the conditions he proceeded with making up the payrolls and paying the men off and issued orders as to what was wanted first, and why he wanted things to go in this or that way, and, as soon as he could, he took over pretty well. He took over the running of the men working for us on The Ferro Concrete work.
>
> "Q. 195. In other words, instead of your superintending and running, he did the running?
>
> "A. Yes, sir. I was helping him and asking him, and any detail of expenditure or any ruling that involved money which I might think would expedite the job or speed up the job couldn't be carried out on my action, but it had to go through him. I don't believe

I could have bought a gallon of kerosene without his approval or his order'' (R. pp. 69, 70, Qs. 194 to 206).

(*b*) Luchini claimed that Lorimer's action in taking over the management was in violation of the agreement of August 8th, which provided that it ''is not intended in any way to interfere with L. Luchini & Son's general supervision and direction of the work'' (for copy of Exhibit 13, see R. p. 67; introduced, p. 66, Q. 179).

Luchini testified that he made this complaint to Starr of Lorimer's doings (Q. 211) and that Starr said: ''We can't change now. You go ahead'' (Q. 212); and that Ferro Company would pay Luchini & Son ''What it was worth to do the job'' (Qs. 212 to 214) (Luchini's testimony, pp. 70, 71; Qs. 211 to 215).

(*c*) Luchini's testimony as to the taking over of the plant and the agreement between him and Starr is supported by other testimony, parts of which we cite:

Mr. Sesona said that Lorimer made up the payroll, *hired the men* and paid them direct, taking receipts (R. p. 229), ordered coal (R. p. 232) and did the managing that Luchini had previously done (R. p. 233, Q. 122) (R. pp. 229, 232, 233).

Mr. Guerrieri said that he was a foreman and that, after Lorimer came, he took orders from Lorimer (R. p. 287, Qs. 37 to 42).

Mr. Lancaster, a dealer in contractors' equipment in Boston, testified that Luchini wanted a second compressor; that he would not give Luchini credit; that Luchini and Starr came to his store to get the compressor; that Starr told him:

> ''That they [Ferro Concrete Construction Company] had taken over operation of the quarry, and *were* to pay all bills applying to labor and equipment for getting out

the stone for their job at Newport known as War Memorial or College Building'' (Lancaster, p. 212, Q. 19).

Mr. Cotter, another equipment man, testified that Starr said they had taken over the quarry (Cotter, p. 201, Q. 48).

Defendant paid on November 4 $2784.15; on November 18 $2005.57; on November 22 $80.42—all in excess of $30,000 (R. p. 82; Plaintiffs' Exhibit 17, p. 531).

These payments over $30,000 were made without notice to Luchini that Ferro Company was paying more than its contract price, or that it intended to charge that excess to Luchini & Son and would expect them to repay it (Luchini, p. 77, Qs. 284 to 286; Qs. 291 to 296).

Starr said that he figured weekly, according to material delivered, what amount of money he should send to the quarry (R. p. 372, Q. 165; p. 398, XQ. 368), but that when he came to the $30,000 limit he did not even notice it. *He was more interested in getting out the stone than he was in the amount he was paying* (R. p. 404, XQs. 420, 421).

This would be a proper attitude for a fair man, provided his company was bearing the expense of getting out the stone; but a very improper attitude if he were disregarding the accumulation of this expense and charging it to the Luchinis.

The jury might have regarded this very attitude as evidence that Starr and Luchini had made this agreement.

The Court submitted to the jury the question of the making of this new agreement between Starr and Luchini (R. pp. 483, 484, 489, 490).

The jury found for the plaintiff.

4. The Circuit Court of Appeals has not challenged the fact that Starr and Luchini made the agreement as found

by the jury. That Court has found that there was no evidence of Starr's authority from the defendant to make the *express* agreement.

In what situation does that leave the parties with reference to the *implied* agreement raised by the first replication to respondents' third plea?

(*a*) Respondents admitted the making of the agreement of August 8th between Starr and Luchini (Brief, *supra*, p. 21). Loring, for the company, admitted that this was a change in the instrument dated March 25, 1933 (R. p. 468, XQs. 260, 263). Lorimer came in to the quarry, at Milford, Massachusetts, as the expediter under this agreement. He was sent by Loring (Brief, p. 23, *supra*).

Luchini and Starr did make the agreement in suit. The jury so found, and that finding has not been challenged.

Under the finding of the Appellate Court it was not binding on the defendant because of Starr's lack of authority from defendant.

But the agreement was made, nevertheless, and by it Luchini & Son *had repudiated* the instrument dated March 25, 1933. If Starr was not agent for defendant, he was a third party and made the agreement as a stranger, and by it Luchini & Son repudiated their prior agreement with defendant.

All the while after that time the defendant, through Starr, its superintendent of construction, took out stone from Luchini's quarry, the plaintiffs and defendant were then operating *without any contract*, and the law would imply payment by defendant on a quantum meruit basis.

(*b*) The law of Massachusetts would apply.

These negotiations took place at Milford, Massachusetts, and the law of that state governs the contract relations.

This case is parallel to and is governed by *Sherman* v. *Buffinton*, 228 Mass. 139.

A résumé of the case follows:

An action at law was brought upon an account annexed for work and materials furnished for a cottage of the defendant. There was a special contract between the parties for doing certain masonry work at the cottage for an entire price, and this contract included building certain concrete piers, basement walls and a chimney with a certain named brick of well-known quality. This contract was subsequently modified by the substitution of tapestry brick for the named brick. This radical departure from the original contract was held by the Court to amount to a revocation of it. On page 141 the Court said:

> "The special contract having been revoked the rights of the parties depend upon the implied obligation raised by law out of their relations. That obligation on the part of the plaintiff was to furnish appropriate material, so far as he furnished material, and to do his work according to the directions of the defendant or her agent in a workmanlike manner so far as possible under those directions. The obligation of the defendant was to pay for work thus performed and such material furnished what they fairly were worth."

Judgment for plaintiff was affirmed.

It is an elementary principle of pleading that, where a party is entitled to file more than one pleading, he files it with the purpose that in case his evidence may fail to support one pleading still it may support the other pleading and the party is entitled to judgment on the pleading which the evidence does support.

(*c*) If the question be raised as to defendant's knowledge of Luchini & Son's breaking of the original contract by entering into the agreement of August 8, we contend that defendant was charged with Starr's knowledge of these facts, since the making of the contract was within Starr's

knowledge so shortly before he received stones which were shipped subsequent to the making of this agreement, while he was acting there unquestionably within his authority as superintendent of construction. Under the law his principal would be charged with such knowledge (Brief, *supra*, p. 25).

(*d*) It is an established rule of law in Massachusetts that if from the evidence it can be found that a plaintiff, having refused to perform the contract which he has made, which he might do and subject himself to damages, and if he went on because of a new contract and finished the work, that is a sufficient consideration for the new agreement, even though it is for a greater sum than originally contracted for.

Munroe v. *Perkins*, 9 Pick. 298.
Holmes v. *Jones*, 9 Cush. 135.
Peck v. *Requa*, 13 Gray, 407.
Rogers v. *Rogers*, 139 Mass. 440.
Thomas v. *Barnes*, 156 Mass. 481.
Tobin v. *Kells*, 207 Mass. 304.

It was upon the above cases that petitioners relied to sustain the express agreement alleged in the record or "further" replication to defendants' third plea.

(*e*) We contend that the case at bar is governed by the pleadings and not by any legal question of the insufficiency of the evidence, and that the judgment on the verdict for the plaintiffs is demanded by this replication to defendants' third plea, raising the issue of fact of the implied agreement.

Slocum v. *N.Y. Life Ins. Co.*, 228 U.S. 364.
Aetna Ins. Co. v. *Kennedy*, 301 U.S. 389, 394, 396.

III.

The Court erred in holding that Rule No. 50 of Rules of Civil Procedure for the District Courts authorized entry of judgment contrary to the verdict of the jury by the Circuit Court of Appeals.

Rule 50, to which we refer, reads as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied, or for any reason is not granted, the Court *is deemed* to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion," etc.
>
> Rules of Civil Procedure for the District Courts of the United States, Rule No. 50.

In applying this rule the Court said

> ". . . the denial of the defendant's motion for a directed verdict was equivalent to a submission of the action to the jury 'subject to a later determination of the legal questions raised by the motion' " (112 Fed. (2d), at p. 492).

1. The rule says that, if such motion is denied or not granted, the Court *is deemed* to have submitted the action to the jury subject to a later determination of the legal questions raised. The rule does not say, and cannot be interpreted to mean, that, if the Court at the trial actually *considers the questions of law* raised and *denies* the motion, it is *conclusively* deemed to have *reserved* the question of law raised by the motion.

Such a construction would violate the right of trial by jury guaranteed under the Seventh Amendment of the United States Constitution. The rule cannot be construed to mean that the trial judge "is deemed" to have done just

the opposite to what the record shows that the trial judge did do.

2. The record shows that the trial judge decided all the legal questions raised by the motion to direct a verdict at the time they were raised and before the case was submitted to the jury.

At the close of plaintiff's testimony defendant filed its motion to direct a verdict. All questions of law raised by the motion were fully argued by both sides. There was a running discussion between Court and counsel as each point was discussed (see R. pp. 293 to 344).

Again, at the close of all the evidence, defendant raised and pressed this same motion, which was argued by attorneys for both sides (see R. p. 556, for printed motion).

At the close of the argument the Court made the following ruling:

> "The Court. Well, I wouldn't waste much time on it because I am satisfied now in my own mind. We have got down to the question whether there was any evidence of such an agreement, substantial evidence, or whether there was *any authority for it.* Starr and Luchini both signed a certain form on August 8th. Starr was the superintendent of construction. He sent all his records or they were sent to the main office and the main office considered them. Loring was on the job a couple of times. I think that is sufficient evidence in my mind to demonstrate that the authority was placed in Starr and ratified by the company, and it comes down to whether or not the jury believes Luchini on the whole evidence or whether they believe the defendants. If there is anything further you want to say about it, why, I will listen to you.
>
> "Mr. Knauer. Well, I don't want to say any more, of course, because that is exactly my view of it.

"The Court. All right. I will deny the motion for a directed verdict.

"Mr. Edwards. May I have an exception?

"The Court. Yes, you may have an exception.

"(Defendant's exception noted)" (see R. p. 478).

Again, after verdict, defendant brought forward the motion to direct a verdict, and, in the alternative, for a new trial (see R. pp. 561 to 566).

Abstracts of the argument are given. It lasted over two hours (R. p. 561, comment of the Court).

The following are comments of the Court which showed that the Court had not reserved any question of law:

"The Court: What I don't understand— You Gentlemen have argued this morning here for a couple of hours and now you want to submit memoranda. Is there anything new or novel in your memorandum that is different from the argument that is now in front of me?" (R. p. 561).

"Mr. Knauer: No, only supplementary, etc.

"The Court: That is what I thought. There is nothing new or novel, is there, in your memorandum there, outside of your argument here this morning?

"Mr. Harrington: No, just citations, etc.

"The Court: My point is . . . whether I should decide now?" (R. p. 562).

"The Court: I don't know as I need take this under advisement and write a rescript on it with the time so short," etc. (R. p. 562).

"The Court: Well, I know. But I have taken elaborate notes. I don't see why I should hold the matter any further, because . . ." (R. p. 563).

"The Court: No, I find myself in this case,—*I went through it on your motion for a directed verdict*—that

> even if it were an Ohio Contract, your alteration, modification or substitution took place in Massachusetts. That is the way *I ruled then.* That is the way I would rule now" (R. p. 563).

The Court denied the motions with the following closing sentence:

> "For that reason I would be compelled myself, by the law as I view it, there being substantial evidence here, not under the scintilla rule or not viewing the evidence that it was ambiguous,—that was overwhelmingly in favor of the petitioners that I should deny the motion for a new trial, and I am compelled to deny the other motion under the new rule to enter judgment for the defendant" (see R. pp. 564-565).

There is no suggestion in the record that the trial Court submitted the evidence to the jury reserving any question of law for later determination. The record shows quite the contrary. It shows an affirmative disposition of the questions of law and an unconditional submission of the issues to the jury. Except for the presence of Rule No. 50 in Federal Rules of Civil Procedure, above referred to, this case would unquestionably have been governed by *Slocum* v. *N.Y. Life Ins. Co.,* 228 U.S. 364. In that case, in the then Circuit Court, the jury returned a general verdict for the plaintiff. The trial Court had not reserved any questions of law for subsequent consideration. "The Circuit Court of Appeals, on an examination of the evidence concluded it was not sufficient to sustain the verdict, and on that ground directed judgment for the defendant." This was held to be in violation of the right of trial by jury.

We quote from the *Slocum* case. At page 376 the Court said:

"That what was done may be clearly in mind it is well to repeat that, while on the trial in the Circuit Court the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals on an examination of the evidence concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, *not* that the judgment was required by the *state of the pleadings,* but that it was warranted *by the evidence.* It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. . . ."

Again, at page 380:

"These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; second, that, while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits would be given. The new determination, according to the rules of the common

law, could be had only through a new trial, with the same right to a jury as before.

"Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus it assumed a power it did not possess, and cut off 'the plaintiff's right to have the facts settled by the verdict of a jury. . . .'"

Again, at page 382:

"In the trial by jury, the right to which is secured by the Seventh Amendment, both *the court* and *the jury* are essential factors. To the former is committed a power of direction and superintendence, and *to the latter the ultimate determination of the issues of fact.* Only through the co-operation of *the two,* each acting *within its appropriate sphere,* can the constitutional right be satisfied. And so, to dispense with either or to permit one to disregard the province of the other is to impinge on that right. . . ."

Again, at page 398:

"Whether in a given case there is a right to a trial by jury is to be determined by an *inspection of the pleadings* and *not by an examination of the evidence.*"

Slocum v. *N.Y. Life Ins. Co.,* 228 U.S. at pp. 376, 380, 382 and 398.

In the later case of *Baltimore &c. Line* v. *Redman,* 295 U.S. 654, this Court holds that this authority of the trial judge to *reserve for later consideration* the questions of law raised by a motion to direct a verdict is an inseparable part of the right of trial by jury guaranteed by the Seventh Amendment to the United States Constitution.

We quote:

"In Slocum v. N. Y. Life Insurance Co. a jury trial in a Federal Court resulted in a general verdict for the plaintiff over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff and the defendant obtained a review in the Court of Appeals. That Court examined the *evidence,* concluded it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant" (p. 657). ". . . It is therefore important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied *without any reservation of the question of the sufficiency of the evidence,* or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence. . . ." (p. 658).

"A very different situation is disclosed in the present case. The *Trial Court expressly reserved its ruling* on the defendant's motions to dismiss and for directed verdict, both of which were based on the *asserted insufficiency of the evidence* to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. . . ." (p. 659).

"At common law there was a well established practice of reserving questions of law arising during trials by jury, and taking verdicts subject to the ultimate rulings *on the questions reserved;* and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the rulings *under the reservation,* such as

non-suiting the plaintiff when he had obtained a verdict, entering a verdict or judgment for one party when the jury had given a verdict to the other, or making other essential adjustments" (p. 659). ". . . But whatever may have been its origin or theoretical basis, it undoubtedly *was well established when the Seventh Amendment was adopted,* and therefore *must be regarded as part of the Common Law Rules to which resort must be had in testing and measuring the right of trial by jury* as preserved and protected by the amendment" (p. 660).

Baltimore &c. Line v. *Redman,* 295 U.S. at pp. 658, 659 and 660.

In the *Slocum* case, where the trial judge had submitted the issues to the jury *without reserving for subsequent decision any questions of law raised* by the motion *for a directed verdict,* it was error in the Circuit Court of Appeals to direct entry of judgment contrary to the verdict of the jury; and in the *Baltimore &c.* v. *Redman* case, where the trial judge *had expressly reserved its ruling* on the motions to dismiss and to direct a verdict, both resting on *insufficiency of evidence,* and upon a finding by the Circuit Court of Appeals that there was *insufficient evidence* to sustain the verdict of the jury, it was error for that Court *not* to direct entry of judgment contrary to the verdict. We find from these decisions that the issues of fact that must be decided by the jury are the issues presented by the pleadings; that, at the common law, *insufficiency of evidence* to support a verdict becomes a question of law for review in the Appellate Court, *only* when the trial Court either *directs* a verdict as requested, or submits the case to the jury conditionally *expressly reserving* for later consideration the questions of law raised by the motion for directed ver-

dict; that the functions of both Court and jury in the above respects were part of the trial by jury guaranteed by the Constitution. In the *Slocum* case the error was in making the insufficiency of the evidence a question of law, when it had not been made so by a *reservation by the trial Court.*

We quote from the *Slocum* case, at page 376:

> "In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, *not* that the judgment was required by the *state of the pleadings,* but that it was warranted *by the evidence,*" and thus "passed finally on the issues of fact presented by the pleading," which was error.

That is exactly the error that has been made in the case at bar, unless Rule No. 50 can revoke this established rule of the common law *that no legal question of the insufficiency of the evidence is raised for the Circuit Court of Appeals because the trial judge did not reserve it.*

Plaintiffs should not be deprived of their right of trial by jury by any technical or erroneous application of this rule. This Court has said that a question of fact raised by the pleadings should be sent to a jury for a new trial even though the evidence to support it may not be strong. We quote:

> "To the suggestion that in so holding we are but adhering to a mere rule of procedure at common law there is a twofold answer: First, the terms of the Amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require 'adherence to that rule, which in long years of practice had come to be regarded as essential to the full realization of the right of trial by jury; and second, the right to a new trial in a case such as this, on the

vacation of a favorable verdict secured from a jury, is a matter of substance and not of mere form, *for it gives opportunity as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence.*"

Slocum v. *N.Y. &c. Co.*, 228 U.S. at p. 399.

Rule No. 50 applies only when the record shows no positive action by the trial judge on the questions of law. If the trial Court rules upon these questions, such *action* governs.

This rule cannot be construed by the Circuit Court of Appeals to permit that Court to *deem* that the trial judge did just the *opposite* of what the record shows that he did. Such a construction of the rule would deny the common-law prerogative of the trial judge to decide the questions of law raised by a motion to direct, and submit the issues to the jury unconditionally or to submit the issues conditionally and reserve the questions of law for later decision. If the Court had authority to reserve decision on the legal questions raised, *a fortiori* it had power to decide such legal questions at once and submit the case to the jury unconditionally.

The words "is deemed," as used in the rule, must be construed to define the effect to be given such failure upon the part of the Court to grant such motion, only when the record is otherwise silent upon the action of the Court. Certainly the Circuit Court of Appeals cannot apply this rule to "deem" a situation to exist that is the direct opposite of what the record shows the trial Court actually created. It cannot "deem" the trial Court to have reserved for future consideration questions of law which it actually decided at once, and to have reserved a question of law

on the insufficiency of the evidence when no such reservation appears on the record. And when the Court held the opinion and actually said at the hearing after verdict that—

> "there being substantial evidence here, not under the scintilla rule or not viewing the evidence that was ambiguous,—that was overwhelmingly in favor of the petitioners," etc. (R. pp. 564-565)—

to construe the rule to mean that he did reserve the question of the sufficiency of the evidence for later determination, notwithstanding his above-expressed opinion and the fact that he decided all legal questions raised by the motion and submitted the case unconditionally to the jury, would, we contend, render the rule repugnant to the Seventh Amendment to the Constitution of the United States. Any party, under the rule so construed, could, by making a motion to direct, take away that common-law prerogative of the trial judge—his discretion to decide the question, when raised, or to reserve it for future consideration.

Conclusion.

It is contended that, in support of the issue of the express agreement raised by the plaintiffs' second or "further" replication to defendants' third plea, the record shows material evidence, on behalf of the plaintiffs, in support of that issue, that Starr had authority or apparent authority to make the new contract, and therefore judgment should follow the verdict of the jury for the plaintiffs.

In case this Honorable Court should find the evidence on the above issue not strong enough to support that issue, then there is material evidence in support of the issue of the implied agreement, raised by plaintiffs' first replica-

tion to defendants' third plea, and notwithstanding the finding of the Circuit Court of Appeals that Starr had not the authority to make the new contract, still the judgment should follow the verdict of the jury for the plaintiffs.

That Rule No. 50 of the Rules of Procedure in the District Courts of the United States does not abrogate the prerogative of the trial judge, under the Seventh Amendment to the Constitution of the United States, to decide, at the trial, the issues of law raised by a motion to direct a verdict and submit the case unconditionally to the jury; that in the case at bar, even if we are entirely wrong as to the sufficiency of the evidence to support the verdict of the jury on all issues, then the order should be for a new trial.

Respectfully submitted,

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